

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT  
SENTENCE BY A PERSON IN FEDERAL CUSTODY

FILED  
DISTRICT COURT OF GUAM  
APR 12 2004  
MARY L. M. MORAN  
CLERK OF COURT  
*(Red)*

<b>United States District Court</b>	District <b>DISTRICT OF GUAM</b> Prisoner No. <b>02134-093</b> Case No. <b>CR-01-00013-001</b>	
Name of Movant <b>HENRY FRESNOZA</b>		
Place of Confinement <b>FPC-Sheridan, P.O. Box 6000, Sheridan, Oregon 97378</b>		
<b>UNITED STATES OF AMERICA</b> v. <b>HENRY FRESNOZA</b> (name under which convicted)		<b>CV-04-00020</b>

**MOTION**

1. Name and location of court which entered the judgment of conviction under attack U.S. District Court  
District Of Guam, Hon. John S. Unpingco
2. Date of judgment of conviction April 17, 2003.
3. Length of sentence 87-months
4. Nature of offense involved (all counts) Attempted Possession Of 200 Grams Of Crystal Methamphetamine aka "ICE" With Intent To Distribute. Title 21 U.S.C. §§841(a) and 846.

## 5. What was your plea? (Check one)

- (a) Not guilty
- (b) Guilty
- (c) Nolo contendere

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

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## 6. If you pleaded not guilty, what kind of trial did you have? (Check one)

- (a) Jury  N/A
- (b) Judge only

## 7. Did you testify at the trial?

Yes  No  N/A

## 8. Did you appeal from the judgment of conviction?

Yes  No

## 9. If you did appeal, answer the following:

- (a) Name of court \_\_\_\_\_ N/A
- (b) Result \_\_\_\_\_
- (c) Date of result \_\_\_\_\_

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?

Yes  No

## 11. If your answer to 10 was "yes," give the following information:

- (a) (1) Name of court \_\_\_\_\_ N/A  
(2) Nature of proceeding \_\_\_\_\_ N/A

(3) Grounds raised \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes  No

N/A

(5) Result \_\_\_\_\_ N/A  
(6) Date of result \_\_\_\_\_

(b) As to any second petition, application or motion give the same information:

(1) Name of court \_\_\_\_\_ N/A  
(2) Nature of proceeding \_\_\_\_\_ N/A

(3) Grounds raised \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(4) Did you receive an evidentiary hearing on your petition, application or motion?  
Yes  No

## (5) Result

(6) Date of result

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes  No

(2) Second position, etc. Yes  No

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State concisely every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all ground in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (i) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea

(b) Conviction obtained by use of coerced confession.

- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: CONVICTION OBTAINED BY THE UNCONSTITUTIONAL FAILURE OF THE PROSECUTION TO DISCLOSE ITS CONFLICTING PRIMA FACIE EVIDENCE OF THE LAW.

Supporting FACTS (state briefly without citing cases or law) The Government failed to disclose to Movant that Title 21 U.S.C. never has been enacted into positive law and that such condition had placed preexisting "prima facie" sections conflicting with their creator Statute at Large, after having been amended by New Actions from numerous Amendatory Acts. ( See Attached Memorandum titled: FIRST MEMORANDUM OF POINTS AND AUTHORITIES).

B. Ground two: DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL BY ALLOWING PLEA WITHOUT UNDERSTANDING NATURE OF CHARGE AND PLEA'S CONSEQUENCES.

Supporting FACTS (state briefly without citing cases or law): Counsel's effectiveness is in question after having convinced Movant to plea guilty in less than 48 hours from the time of Movant's arrest. Movant claims that counsel's advice "just agree now and go home" created an illusional understanding over the nature of the charge and the consequences of the plea. (See Attached Memorandum titled: SECOND MEMORANDUM OF POINTS AND AUTHORITIES, pages -1 thru 7-)

C. Ground three: DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL BY NOT MITIGATING SENTENCING ENTRAPMENT.

Supporting FACTS (state briefly without citing cases or law): Counsel failed to mitigate the Sentencing Entrapment which is part of the Government's dominion and control of the amount of drugs involved in the Government's reverse-sting operation. (See Attached Memorandum titled: SECOND MEMORANDUM OF POINTS AND AUTHORITIES, pages -7 thru 10).

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all ground in this motion, you may be barred from presenting additional grounds at a later date.

D Ground four DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL BY NOT MITIGATING THE DRUG'S MIXTURE.

Supporting FACTS (state *briefly* without citing cases or law): Counsel failed to mitigate the "ICE's" mixture as a requisite for the Sentencing Guidelines' purposes. (See Attached Memorandum titled: SECOND MEMORANDUM OF POINTS AND AUTHORITIES, pages 10 thru 12),

E Ground five DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL BY NOT MITIGATING THE AMOUNT OF DRUGS ATTRIBUTABLE TO MOVANT.

Supporting FACTS (state *briefly* without citing cases or law): Counsel failed to mitigate the correct amount of "ICE" attempted to possess with intent to distribute since no conspiracy charge exists in this case. The records show a controvertible issue of what amount of "ICE" was clearly found in Movant's left front pant's pocket. (See Attached Memorandum titled: SECOND MEMORANDUM OF POINTS AND AUTHORITIES, pages 12 thru 15).

F Ground six DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL BY NOT MITIGATING MOVANT'S ACTION AS ABERRANT.

Supporting FACTS (state *briefly* without citing cases or law): Counsel failed to mitigate the Movant's action as aberrant during sentencing for a court's consideration for a downward departure within the sentencing court's discretion. (See Attached Memorandum titled: SECOND MEMORANDUM OF POINTS AND AUTHORITIES, pages 15 thru 18).

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all ground in this motion, you may be barred from presenting additional grounds at a later date.

G Ground seven :DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL BY NOT DEFENDING CONVICTION OBTAINED WITH AN UNCONSTITUTIONAL STATUTE.

Supporting FACTS (state *briefly* without citing cases or law): Counsel failed to defend against an unconstitutional statute which impermissibly removed most, if not all, of "the essential attributes of the judicial power" from the Article III district court, based on precedented question of interpretation of Article III, already established by the Supreme Court. (See Attached Memorandum titled: THIRD MEMORANDUM OF POINTS AND AUTHORITIES).

H Ground eight :CONVICTION OBTAINED OUTSIDE FROM THE DISTRICT COURT'S POWER TO HEAR THE CASE.

Supporting FACTS (state *briefly* without citing cases or law): Movant claims that the alleged offense "Attempted Possession With Intent To Distribute cannot be made an offense against the United States because it occurred outside of the federal Government's exclusive or concurrent federal territorial jurisdiction under Title 40 U.S.C. §255. (See Attached Memorandum titled: FOURTH MEMORANDUM OF POINTS AND AUTHORITIES).

— Ground \_\_\_\_\_

Supporting FACTS (state *briefly* without citing cases or law): \_\_\_\_\_

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all ground in this motion, you may be barred from presenting additional grounds at a later date.

\_\_\_\_ Ground : \_\_\_\_\_

Supporting FACTS (state *briefly* without citing cases or law): \_\_\_\_\_

13. If any of the grounds listed in 12A thru 12-H were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: \_\_\_\_\_

"A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdiction grounds in a collateral proceeding. See, Baldwin v. Traveling Mens Ass'n, 283 U.S. 522, 525, 75 L.Ed. 1244, 51 S.Ct. 517 (1931).

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes  No

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Richard Arens

(b) At arraignment and plea Richard Arens

(c) At trial \_\_\_\_\_ N/A

(d) At sentencing Phillip Torres, 330 Hernan Cortez Avenue, Suite 200

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(e) On appeal \_\_\_\_\_ N/A

(f) In any post-conviction proceeding \_\_\_\_\_

(g) On appeal from any adverse ruling in a post-conviction proceeding \_\_\_\_\_

N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes  No 

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes  No 

(a) If so, give name and location of court which imposed sentence to be served in the future: \_\_\_\_\_

N/A

(b) Give date and length of the above sentence: \_\_\_\_\_

N/A

- (c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes  No 

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

\_\_\_\_\_  
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

April 2, 2004  
(date)

  
\_\_\_\_\_  
Signature of Movant